RS v KS (ABDUCTION: WRONGFUL RETENTION) [2009] EWHC 1494 (Fam)

Family Division

Macur J

26 June 2009

Abduction – Delay in bringing proceedings – Date of wrongful retention or removal – Child living in England for 2 years – Settlement – Whether intolerable situation in return

The parents were both Lithuanian; for a time they both lived and worked in Sweden, but the mother returned to Lithuania, by agreement, during her pregnancy. After the child was born the father worked in and was based in Sweden, while the mother and the child were based in Lithuania; the father visited the mother and child in Lithuania at regular intervals. Before the child's 2nd birthday the father consented to the child travelling to England with the mother for a 3-week holiday. Unbeknown to the father, the mother had already consulted lawyers about the state of the marriage and, during the 'holiday' the mother issued divorce proceedings in Lithuania, in which she sought residence of the child and child maintenance. At the end of the agreed 'holiday' period, the mother and child remained in England, although the mother travelled to Lithuania on occasions to attend the Lithuanian court proceedings. Eventually, the Lithuanian court granted the mother residence of the child. However, the father's appeal was allowed and, the matter was remitted for a retrial by the relevant Lithuanian court. In the meantime, about 2 months after the child should have returned, the father had asked the authorities for help in recovering the child; after a number of procedural false starts, the father eventually issued Hague Convention proceedings one year and 4 days after the child left Lithuania. These proceedings were delayed by funding issues for both parents, and further delays were generated by the slowness of both parties to respond to directions, and in particular by the father's failure to attend court on a number of occasions. Eventually, despite the father's failure to attend, the case went ahead; the child was now 4 years old, and had been in England for over 2 years. The judge decided to hear the mother's oral evidence because the affidavit evidence of both parties was unclear and contradictory. There had been no progress at all in the Lithuanian proceedings; the only hearing listed had been vacated because neither parent had attended (the mother had been advised that, given that the father had indicated that he would not be attending, it would be pointless for her to do so).

Held – dismissing the father's application for summary return –

(1) This had been a case of wrongful retention subsuming a wrongful removal. When the mother had removed the child from Lithuania, ostensibly for a holiday, she had had no intention of returning the child to Lithuania, in accordance with the agreement reached with the father, and therefore, the father's consent to the trip had been obtained by deceit. The mother had then retained the child beyond the agreed date of his return. In that this interpretation admitted the possibility that wrongful removal and wrongful retention were not mutually exclusive, this was a departure from the reasoning in *Re H (Abduction: Custody Rights)* [1991] 2 AC 476, but not a departure from the determination that the act of retention was an event occurring on a specific occasion. An intention wrongfully to retain had to be communicated to the left behind parent/custodian in word and deed for the purpose of the 12-month 'limitation' period, after which, under Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980, the child's settlement became a possible reason for refusing summary return (pace *Re S (Abduction: Wrongful Retention)* [1994] Fam 70). The alternative approach would threaten certainty, and would penalise an applicant by commencing the limitation period before he could or should have been

aware that his rights had been breached. The relevant date for the purpose of assessing whether the father had commenced proceedings after the expiration of one year was, therefore, the date on which the child should have been returned to Lithuania under the 'agreement'. It followed that the 12-month period had not elapsed before the father issued proceedings (see paras [31], [32], [37], [39]).

(2) However, even if the proceedings had been issued within a year, undue delay and settlement could, in appropriate circumstances, constitute the basis of an argument that the child would be exposed to an intolerable situation, under Art 13(b), if summarily returned to the country of habitual residence. In this context 'intolerable' meant 'a situation which this particular child in these particular circumstances should not be expected to tolerate'. In this case the child, now aged 4, was integrated so completely within his new life in time, location and physical and social environment that he could be described only as 'settled', and this established a defence under Art 13(b) which gave the court a discretion whether to return the child. The child had no cognitive recognition of an earlier and different life or community, and his age and development had inoculated him from the uncertainties of the mother's position. Disrupting the living arrangements of a child of this age would have more far-reaching consequences and adverse impact than in the case of an older and less sensitive child, able to comprehend the change, and would go beyond the 'inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence'. The court was alert to the possibility that 'absconding' parents would choose to generate delay to gain an advantage, but in many such cases the 'absconding' parent might well 'unsettle' the relevant child by virtue of their own inevitable uncertainty as to the outcome of proceedings (see paras [37], [40], [43]–[46]).

(3) The court had considered whether the objectives of the Hague Convention could be fulfilled by 'suspending' or 'staying' an order for return on conditions. The possibility of 'suspension' of the order was well within the armoury of the court at the time of exercising its discretion, as was considering the timing and imposition of 'safeguards' necessary to protect the child upon return. However, deployment of a 'suspension' was necessarily fact-specific, and would be the exception rather than the rule. It would not be ordered in this case, because it would promulgate the harm it sought to abate. Having adjudged the child to be sufficiently settled to invoke Art 13(b), delaying any appropriate return would mean that the harm the child was at grave risk of suffering would increase with his ever increasing establishment, stability and security of life in England (see paras [51]–[53]).

(4) The court exercised its discretion against ordering the child's immediate return to Lithuania. There were no safeguards that would supply or mitigate the loss of his community, society and present lifestyle in the short or medium term and therefore, at his age, the 'grave risk' of psychological harm or intolerability would go unabated. This was no longer a 'hot pursuit' case and whatever happened the Hague Convention objective of securing a swift return to the country of origin could not be met. The Lithuanian court would be invited to stay the case, given that the mother was now habitually resident in England, and that the father, who was not a full-time resident in Lithuania, would have equal geographical access to the English courts as to the Lithuanian courts (see paras [48], [50], [57], [58]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 4, 5, 12, 13(a), (b), 15

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11(4), (7), (8)

Cases referred to in judgment

AZ (A Minor) (Abduction: Acquiescence), Re [1993] 1 FLR 682, CA
C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, CA
D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL
F v M and N (Abduction: Acquiescence: Settlement) [2008] EWHC 1525 (Fam), [2008] 2 FLR 1270, FD
G (Abduction: Striking out Application), Re [1995] 2 FLR 410, FD
G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence), Re [2007] EWHC 2807 (Fam), [2008] 2 FLR 351, FD
H (Minors) (Abduction: Custody Rights), Re [1991] 2 AC 476, [1991] 3 WLR 68, [1991] 2 FLR 262, [1991] 3 All ER 230, HL
JPC v SLW and SMW (Abduction) [2007] EWHC 1349 (Fam), [2007] 2 FLR 900, FD
M ((Children) (Abduction: Rights of Custody), Re [2007] UKHL 55, [2008] 1 AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL
M v M (Abduction: Settlement)[2008] EWHC 2049 (Fam), [2008] 2 FLR 1884, FD
P v The Secretary for Justice [2003] NZLR 54, NZ HC
P v The Secretary for Justice [2004] 2 NZLR 28, NZ CA
S (Custody: Habitual Residence), Re [1998] AC 750, [1997] 3 WLR 597, [1998] 1 FLR 122, [1997] 4 All ER 251, HL
S (Minors) (Abduction: Wrongful Retention), Re [1994] Fam 70, [1994] 2 WLR 228, [1994] 1 FLR 82, [1994] 1 All ER 237, FD
Toren v Toren (1999) 26 F Supp 2d 240, US DC (MA)
Zucker v Andrews (1998) 2 F Supp 2d 134, US SC (MA)

Teertha Gupta for the plaintiff
Edward Devereux for the first defendant
Indira Ramsahoye for the second defendant

Cur adv vult

MACUR J:

[1] This is an application by Mr RS (the father) pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1 (the regulation) as incorporated into the law of the UK by the Child Abduction and Custody Act 1985, by which he seeks the summary return of his child, L, (dob 5 April 2005) to Lithuania. Miss KS, (the mother), accepts that L remains in this jurisdiction since January 2007 without the father's consent; that the father had 'rights of custody' and was exercising them prior to L's removal from Lithuania (see Arts 3 and 5 of the Hague Convention); and that L was habitually resident in Lithuania prior to the retention (see Art 4 of the Hague Convention). She relies upon Art 12 and 13(b) of the Hague Convention, arguing that in the latter respect there is no 'adequate arrangement' that can be made 'to secure the protection' of L after his return. (See Art 11(4) of the regulation.)

[2]

(i) I have decided to refuse to order the return of L for the reasons indicated below.

(ii) I am satisfied that the father has been given the opportunity to be heard.
(iii) I invite the courts of Lithuania to stay the proceedings before them insofar as they relate to L and invite the courts of the UK to assume jurisdiction.
(iv) I direct that a copy of the court order of non-return and of the relevant documents including a transcript of my judgment shall be sent to the Lithuanian court with jurisdiction in relation to L within one month of today.

The factual background

[3] The mother and father are Lithuanian nationals. They met in or around 2003 and in the summer of that year moved together to Sweden, where the father worked as a builder and the mother worked as a cleaner. When the mother was pregnant with L, the parties agreed that she should return to Lithuania and she did so in or around September 2004. The father apparently visited Lithuania for Christmas in 2004 and in February 2005 when he proposed to the mother. They married on 10 March 2005 and L was born on 5 April 2005 in Lietuva, Prienai. The father then stayed in Lithuania until sometime in around May 2005, when he returned to Sweden.

[4] The mother visited and stayed with the father in Sweden in July/August 2005, for about 2 months. The father visited the mother and L in Lithuania at Christmas time 2005 and thereafter travelled between Sweden and Lithuania approximately every 2 months, staying for periods of one to 2 weeks.

[5] In or about December 2006 the father agreed that L could accompany his mother to this jurisdiction for the purposes of a holiday from 10 January 2007 until 1 February 2007 and provided a written consent dated 8 January 2007 to this effect. The relevant border control authorities were informed as required. The mother and L travelled to this country on either the 10 or 12 January 2007. Unbeknownst to the father, the mother by this time had consulted lawyers about the deteriorating state of their marriage.

[6] The mother makes allegations of domestic violence during the marriage against the father. He has made no admission of the same, but the Kaunas Regional Court, sitting in its appellate capacity have upheld them by judgment dated 23 December 2008. They have, I find below, no relevance to my determination of the case and are merely recorded here as part of the background circumstances. Mr Devereux, on behalf of the mother, realistically does not solely rely upon them to establish an exception to the obligation of summary return to the place of habitual residence prior to removal pursuant to Art 13(b) of the Hague Convention.

[7] The history of the 'divorce proceedings' has formed the basis for many repeated, un-opposed applications for adjournments in this jurisdiction and are, therefore, indicated in brief below.

[8] By a 'statement of claim' made in the Regional Court in the District of Prienai dated 10 January 2007 and issued by the court on 11 January 2007 the mother sought, inter alia, the dissolution of marriage, child maintenance and residence of L.

[9] On 1 August 2007, the father made a cross-application to dissolve the marriage.

[10] There were directions hearings on 25 October 2007, 13 or 30 November 2007, when the two proceedings of the mother and father were merged, and on 20 December 2007. The final hearing was heard on 29 February 2008 and judgment reserved. On 14 March 2008, Judge Urboniene gave judgment for the mother, dissolving the parties' marriage and granting her residence of L.

[11] The father appealed. Directions in the appeal were given on 9 June and 2 September 2008. The appeal was heard on 20 October 2008 and judgment provided on 23 December 2008 whereby the appeal was 'granted partially' and the decision of 14 March 2008 was annulled and returned for retrial. There has been an abortive hearing on 12 May 2009 when neither party attended before the court. According to the mother's evidence, she was informed by her solicitor that the father had indicated that he was not going to attend and that, therefore, it was pointless for her to do so and the next hearing in Lithuania concerning divorce and residence is due in September 2009. I accept her evidence on this issue.

[12] The mother has travelled to Lithuania on occasions in order to attend before the court.

[13] The history of court proceedings concerning L's return to Lithuania commenced with a letter dated 18 April 2007, written by the father to the Prienai District Municipality Administration Children Rights Protection Division requesting that they 'help me to learn where my son LS currently lives, to help me to take back him, to grant the possibility to take care of him and to participate in son's education'. In a letter dated 26 April 2007 in response he was told that:

> '… the division has no power to repatriate children or to identify their living place in a foreign country. Basing on the fact that your wife was granted the temporary permission to go to a foreign country with her son and if it is determined that she breaches the indicated time of stay, you are entitled to address law-enforcing bodies in any EU country regarding child's kidnapping.'

On the same day, the father's Lithuanian solicitors informed the Prienai District Police Commissariat that the M had wrongfully retained L and requested a search be undertaken for L.

[14] On 4 May 2007, the father applied without notice to the Prienai Parish Court requesting the return of L to Lithuania and a residence order. The issue of his 'petition' was refused on 28 May 2007. The father successfully appealed this order and by order on 4 July, 2007 the application was restored.

Hague Convention proceedings

[15] The father applied to the Lithuanian Central Authority on or around 14 January 2008 which communicated the application to the English Central Authority by letter dated 21 January 2008. Solicitors were instructed by letter dated 28 January 2008. The father's representatives first attended on a without notice basis before Bennett J on 31 January 2008 and issued their originating summons sometime on 1 February 2008. The mother was served on 2 February 2008.

[16] The matter was re-listed on 11 February 2008; 17 March 2008; 7 April 2008; 22 April 2008; 2 May 2008; 13 May 2008; 21 May 2008; 10 June 2008; 25 July 2008; 18 September 2008; and 3 November 2008.

[17] Initially public funding 'issues' for both the mother and the father delayed progress. The mother was then tardy in serving a statement of defence. A direction that 'there shall be no requirement for the parties to give oral evidence' on 2 May 2008 was apparently superseded on the basis of paper application on 12 May 2008 that 'the defendant shall attend the hearing provided for … in person'. The father was then slow to respond to the mother's 'statement of defence and was required to do so by Charles J 'on a date prior to the directions hearing' which had been listed on 24 June 2008, and yet on 25 July 2008, 'upon the basis that the decision of the appellate court Lithuania is still pending, but the final hearing in that court is expected on 2 September 2008' Holman J ordered the mother to file a 'defence statement' by 11 August 2008, which time was further extended by Parker J on 18 September 2008, when the decision of the Lithuanian court was then said to be expected on 2 October 2008.

[18] In September the parties sought and were granted permission to seek an expert's report on the issue of 'rights of custody'. On 3 November 2008 King J accepted the undertaking of the mother to comply with the Lithuanian court's directions as to the provision of documents and the parties were to make contact with Thorpe LJ's office to seek assistance to 'minimise' delay and assist in the determination of the dispute between the parties. On 15 January 2009, Wood J adjourned the hearing to 6 April in the absence of the father due to ill health despite his 'attendance' on the telephone assisted by an interpreter in the UK, ordered the father to attend but directed that 'the matter of oral evidence is hereby reserved to the trial judge', made L a party to the proceedings and permitted the mother to file 'a further defence statement' and affidavit in limited terms.

[19] The matter came before me on 6 April 2009. The father did not attend. There was no available explanation for his non-attendance which 'surprised' his current legal team. I rejected the mother's application to strike out his application for summary return and granted the application made by Mr Gupta on the father's behalf for an adjournment, but reserved the case to myself to commence on 11 June. I required both parties to attend the hearing making clear that I would proceed in the father's absence if necessary and appropriate to do so. I required the father to file an affidavit dealing with his absence and failure to give instructions, the date when he had first been notified of the mother's intention to retain L in this jurisdiction and his purported conversations with the mother's Lithuanian solicitor. It is a trite but inevitable comment that the enormous expense of these numerous hearings made little progress towards resolution of the father's application and would necessarily have provoked anxiety and frustration and defeated the overriding principle of a speedy determination as required by the Hague Convention and regulation. (See Art 11 of the Hague Convention and regulation.)

[20] On 5 June 2009 an application was made on short notice to inform me that the father was unlikely to attend the hearing and to seek further directions. I considered that this possibility had already been catered for in the order made on 6 April 2009 which provided that, save for just cause, the case would proceed in his absence. I made clear that since the only oral evidence

that would be before the court would come from the mother and that there were obvious implications that followed and inferences that I may be asked to draw from the father's failure to attend, he should be reminded of the consequences of his non-attendance.

[21] The father failed/refused to attend the final hearing depending upon whether the account he provided in his statement dated 8 June 2009 is correct or whether the oral telephone instructions he gave to his legal team about the same time are the more accurate. The first suggested that he would attend the hearing if his work commitments/financial resources permitted. The second, more bullish in tone, to the effect that so far as he was concerned this was a matter for the Lithuanian courts and not those of the UK and he would await L's return. Neither reason satisfied me that I should adjourn the proceedings further of my own volition and no such application was made on his behalf. I deemed the father to be present in that he was represented and was assured that Mr Gupta had sufficient instructions to proceed. Those instructions confirmed that the facts relating to L's retention and notification of retention remained in dispute.

[22] I considered the affidavit evidence of the parties was at odds, unclear or self contradictory and decided to proceed to hear the mother's evidence, as intended. Ms Ramsahoye, instructed on behalf of L, attempted to dissuade me hearing the evidence of one party in the absence of the other. Unusually she was unable to sustain the point of what I found to be the nebulously expressed and formulated concern of her professional and lay client (L's guardian), who nevertheless wished me to proceed with the application. Whilst recognising that receipt of oral evidence is the exception rather than the rule in what should be summary proceedings, I considered that this was an exceptional case involving a 'limitation point' prospectively defined by hours not weeks or months.

[23] Mr Devereux in his position statement claimed that the contents of the father's first statement supported the mother's written evidence in terms: 'Whilst K was in England we spoke on the telephone and it was then that she informed me that she had no intention to return to Lithuania'. However, by reason of the manner in which his statement had been prepared, that is written in English – no doubt from information obtained via the relevant Central Authority – and then translated into Lithuanian for his approval, and what appeared to be inappropriate use of some tenses, I regarded this to be ambiguous in the light of the mother's self contradictory written evidence on crucial dates. I concluded, therefore, that she was entitled to clarify the same and the father was entitled to challenge her assertions – since he had taken issue with them in subsequent statements. There had already been unconscionable delay, the father's legal team anticipated that evidence would be subject to challenge by cross-examination and knew of the prospective inferences I felt at liberty to draw against him given his intentional absence if the mother, who bore the burden of proof to substantiate 'exceptions' to her obligation to return L to Lithuania, sufficiently clarified her written evidence. Time was available to hear the evidence and it seemed to me that the overall interests of justice would be served in testing the disputed facts upon which rested the availability or otherwise of one of the mother's so called defences, namely that L had settled in the jurisdiction.

[24] Regardless of the position revealed by the documents, Mr Devereux argued that in the face of the father's intentional and inexcusable absence in disobedience of a court order I should 'strike out' his application. He relied upon the case of *Re G (Abduction*: *Striking out Application)* [1995] 2 FLR 410. I considered the factual basis of that case to be far different from this. The 'G' children had, like L, also been present in this jurisdiction for 2 1/2 years; however, their father had not sought any directions in his 'Hague Convention' summons, issued 18 months after the wrongful retention, for 8 months. In this case there have been numerous court hearings and the father does not bear sole responsibility for the delay as indicated above. I refused his application.

[25] In hearing the mother's oral evidence it became clear that her written evidence was at odds with her present recollections on the significant aspect of when she informed the father that she would not be returning with L to Lithuania. (Ultimately I did not take this to go to her credibility rather than to be the product of the similar means of preparation of her affidavits to that of the father. That is, her written statement was penned in her second language, English, and translated to her to agree its contents. The nuances of a first hand account are thereby lost and the possibility of misunderstandings increases.)

[26] Contrary to her written evidence to the effect that she told the father that 'she had no intention to return to Lithuania' on or about 19 January 2007, it became clear that she had told him that she had no intention to return to him in Lithuania. This is entirely consistent with the facts that she had instructed a 'divorce' lawyer in Lithuania immediately before travelling to London, her petition of divorce was issued on 11 January 2007 and the father apparently visited the lawyer's office regarding the same before 1 February 2007. She conceded in cross-examination by Mr Gupta, who appeared on behalf of the father, that she anticipated her return to Lithuania 'after the dust had settled', which by implication would be fairly soon since she expected the divorce proceedings to be over quickly, and had not decided to 'settle' in the UK until after 6 months had elapsed when she felt 'at peace' here. But she also made plain that at her point of departure from Lithuania she had had no intention of returning L to Lithuania on the expiry date of the written consent she had obtained from the father.

[27] I find on the totality of her evidence:

(i) that she had no intention to honour the agreement reached with the father as to when she would return L to Lithuania prior to her departure from Lithuania;
(ii) at the time of her arrival she had no settled intention of remaining in the UK:
(iii) she formed an intention to settle in the UK in or about June/July 2007;
(iv) she did not inform the father of her plans prior to 1 February 2007.

[28] In addition I heard, at the invitation of the parties, Ms Marion Werner-Jones who was appointed as L's guardian and who had prepared reports dated 26 March 2009 and 8 June 2009, visited the mother and L at home on 13 and 17 March 2009, contacted L's nursery manager and the local

social services department and spoken to the mother and L on the telephone on 28 May and 4 June 2009 to be updated as to the father's contact with L.

[29] The reports are positive as to the mother's care of L who is described as a 'happy, lively, very loving and affectionate little boy' who 'switches with ease between conversing in the Lithuanian language with his mother and grandmother and in English with others'. Ms Werner-Jones confirmed that he is very settled in his nursery, which he attends 5 days a week, with an established group of friends, is popular with the staff, very attached and settled with his mother. The nursery had informed her that L is a child 'who takes time to get used to new routines' but once settled was secure. He had shown considerable reluctance at the prospect of moving nurseries when his mother moved house. In her unequivocal view, given his age and the date upon which he arrived in this jurisdiction, his 'retrievable memories' are entirely those of living in the UK. There has been no recent contact between the father and L which appears to be his default rather than the mothers.

[30] The following issues arise for determination:

(1) Is this a case of wrongful removal or wrongful retention?
(2) What is the relevant date of either removal or retention?
(3) If the point of wrongful removal or retention is found to have occurred over one year prior to the issuing of the father's originating summons, is L 'settled in his new environment'?
(4) Is this a quasi-settlement case in that given the elapse of time and the fact that L is 'settled' to order his return to Lithuania would give rise to a grave risk of psychological harm or otherwise place him in an intolerable situation?
(5) If either Art 12 or 13(b) exceptions are made out, how should the court exercise its discretion?
(6) In the event that neither 'exception' is established, should I 'stay' the order for L's return pending the disposal of proceedings in Lithuania?
(7) Is it an appropriate case to seek transfer of jurisdiction of the children's proceedings in Lithuania pursuant to an Art 15 regulation request?

[31] My findings on the evidence indicated in para [27] above lead me to conclude that this was a case of wrongful retention which subsumed a wrongful removal. That is, the mother concedes that prior to his removal to the UK, she had no intention to return L in accordance with the agreement she reached with the father and, therefore, his consent to the trip was obtained by deceit and would be vitiated. However, the real mischief perpetrated by the mother was to retain L beyond the agreed date of his return. I draw an inference from the fact of the written consent that prior to that time the father would have 'acquiesced' in L remaining in the UK until the conclusion of his holiday on 1 February 2007 unless he had been notified by word or deed that the mother had no intention to honour their agreement in the meantime. (See *Re G (Abduction*: *Withdrawal of Proceedings*, *Acquiescence and Habitual Residence)* [2007] EWHC 2807 (Fam), [2008] 2 FLR 351 at para [50].)

[32] In that this interpretation admits the possibility that wrongful removal and wrongful retention are not mutually exclusive, I depart from the reasoning

of the speech of Lord Brandon of Oakbrook in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, [1991] 3 WLR 68, [1991] 2 FLR 262 at 500, 78–79 and 272 respectively, but do not depart from his determination that the act of retention is an event occurring on a specific occasion. My approach would seem supported by that part of the speech of Lord Slynn of Hadley in *Re S (Custody: Habitual Residence)* [1998] AC 750, [1997] 3 WLR 597, [1998] 1 FLR 122 at 767G, 607 and 131 respectively.

[33] The question, therefore, is whether the mother's un-communicated decision to retain L beyond 1 February 2007 was sufficient to constitute a 'wrongful retention'.

[34] In *Re AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682, Sir Michael Kerr said (at 689D):

> 'Without deciding the point, particularly since it has not been pressed in argument, I am doubtful about the first ground on which the judge relied. It seems to me that the un-communicated decision which the mother took in her own mind in November 1991 not to return the boy on 21 January 1992 could hardly constitute a wrongful retention in November 1991. It was at most an un-communicated intention to retain him in the future from which she could still have resiled.'

[35] In *Re S (Minors) (Abduction: Wrongful Retention)* [1994] Fam 70, [1994] 2 WLR 228, [1994] 1 FLR 82 Wall J (as he then was) said (at 81F, 239 and 93 respectively):

> 'However, it seems to me that where a parent, as here, announces as part of her case that she does not intend to return the children to Israel at all she can no longer herself rely on the father's agreement to the limited period of removal or retention as protecting her either under Article 3 or under Article 13(a). As Mr Turner puts it, she cannot have the benefit of the agreement without the burden. Equally, *as an issue of fact*, [my emphasis] it seems to me that the decision which precedes the announcement, even if not communicated to the father, must be capable itself of constituting an act of wrongful retention.'

[36] Any attempt to reconcile the two opinions could only be made on the basis that Wall J decided the case before him on its facts and without the necessity to consider the quasi 'limitation' period imposed by Art 12, since in *Re S* (above) the mother was seeking to defeat the father's application for summary return of the children to Israel by arguing he was premature and not that he was too late. It appears that in this particular case Wall J was motivated to ensure the father was not disadvantaged by a summary dismissal of his case.

[37] In that he decided as a matter of law that an intention to wrongfully retain does not have to be communicated to the left behind parent/custodian in word or deed for the purpose of the 12-month period which triggers a prospective exception to summary return on the basis of 'settlement', I respectfully disagree. I adopt the argument of Beaumont and McEleavy, in *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) at p 41, that this approach would 'threaten certainty' and

'penalise an applicant by commencing the limitation period before he could [or, I insert, should] have been aware that his rights had been breached'. That is not to undermine the safeguarding of the child's position which, in my view, may be protected in appropriate cases where the facts reveal a sufficient degree of 'settlement' in particular circumstances to call into question the triggering of Art 13(b).

[38] Mr Devereux has highlighted the approach of other jurisdictions on the point of what may be termed to be anticipatory wrongful retention by reference to the cases of *Zucker v Andrews* (1998) 2 F Supp 2d 134; *Toren v Toren* (1999) 26 F Supp 2d 240; *P v The Secretary for Justice* [2004] 2 NZLR 28, overturning *P v The Secretary for Justice* [2003] NZLR 54. I do not consider that they advance the case for or against an un-communicated intention of wrongful retention.

[39] I determine the relevant date for the purpose of assessing whether the father commenced the proceedings 'after the expiration of one year' (Art 12) is 2 February 2007; that is, the date upon which L should have been returned to Lithuania in accordance with the agreement in the absence of any overt indication by the mother that she had resiled from that plan. I accept Mr Gupta's argument that the written consent gives inclusive dates of removal. In any event, the father appeared by counsel before the court on 31 January 2007 'In the Matter of the Child Abduction and Custody Act 1985; And in the Matter of the Council Regulation (EC) No. 2201/2003' and thereby, in my judgment, 'commenced proceedings' by seeking directions including a 'location order', which was granted upon an undertaking to file an originating summons, as it was, the next day. Therefore, whether the proceedings commenced on 31 January, 2007 by without notice hearing and judicial consideration of the father's complaint, or 1 February 2007 upon actual issue, the father may legitimately claim to have negated the mother's recourse to Art 12.

[40] Regardless of this decision insofar as it disposes of Art 12 considerations I nevertheless consider that the circumstances of this case require me to review the facts that would otherwise be relied upon by the mother to establish 'settlement'. In doing so I indicate the decision that I would have reached if the 12-month period had otherwise have been found to have elapsed, but also with a view to Art 13(b).

[41] In *Re N (Minors) (Abduction)* [1991] 1 FLR 413 at 418 Bracewell J held that the term 'settled' should be given its ordinary and natural meaning and that in this context has:

> 'two constituents. First, it involves a physical element of relating to, and being established in, a community and an environment. Secondly, … it has an emotional constituent denoting security and stability.'

In that this definition may be considered formulaic, Mr Devereux argues that the concept of settlement may well have been refined by the decision in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251, para [52], and in doing so relies upon the judgment of Black J in *F v M and N (Abduction: Acquiescence: Settlement)* [2008] EWHC 1525 (Fam), [2008] 2 FLR 1270 at

paras [66]–[68]; and *M v M (Abduction: Settlement)* [2008] EWHC 2049 (Fam), [2008] 2 FLR 1884 at paras [33]–[37].

[42] I agree that insofar as it was considered to be a restrictive approach, those limits have been relaxed although not to the extent to permit the court to merely reflect upon physical location and the passage of time. I approach this aspect of the case with a view to assessing L's degree of integration into his physical and social environment entirely independent of his dependence upon and attachment to the mother as his primary carer.

[43] The evidence of Ms Werner-Jones, oral and written, satisfies me that L is integrated so completely within his new life in time, location and physical and social environment that he could only be described as 'settled'. In reaching this conclusion I posed the question to myself as to the effect upon L of his mother's removal/absence from him in order to cross check the result. My answer was that on the evidence before me his sense of devastation would be assuaged by him continuing his daily routine in surroundings known to him and accepted by him as essential ingredients in his life. This is rendered so by reason of his age and development now and at the time he arrived in the UK.

[44] He has known no other life and has had to make no conscious adjustment to a change in his geographical circumstances. He has no cognitive recognition of an earlier and different life or community. Whilst his age and commensurate development and maturity necessarily render him 'dependent' upon the mother's sense of well-being and security, they also serve to inoculate him from the uncertainties of the mother's position, unclear in her initial intentions as Mr Gupta demonstrated them to be, and uncertain as to the security of her continuing residence with L by reason of the proceedings in this jurisdiction and Lithuania. There is no evidence that he is other than blissfully unaware of the court proceedings, and has seen Ms Werner-Jones as nothing more than another interesting adult whom he can charm and engage with.

[45] That undue delay and settlement may, in appropriate cases, constitute the basis of an argument that a child would be exposed to an intolerable situation if summarily returned to their country of habitual residence prior to removal is recognised by Baroness Hale of Richmond in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961 at paras [51]–[53]. In particular I note that the word 'intolerable' in this context should be taken to mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'. Such an approach is fact specific and, in my opinion, does not detract from nor undermine the well-established statement of principle found in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 at 1154, that there is:

> '… an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

[46] In this case I consider that to disrupt L's present living arrangements would have more far reaching consequences and adverse impact than in the case of an older and less sensitive child able to comprehend a sudden departure from one routine and community and the prospect of the next and would transgress the 'inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence'. I do not come to this decision lightly, being alert to the reason for the delay which other parents in a similar situation to this mother may adeptly manipulate to their own advantage by one unmeritorious appeal after another in a foreign jurisdiction. In many such cases the 'absconding' parent may well 'unsettle' the relevant child by virtue of their own inevitable uncertainty as to the outcome of proceedings. In light of that finding I consider the mother to have discharged the burden of establishing a 'defence' under Art 13(b).

[47] I must, therefore, consider whether it 'is established that adequate arrangements have been made to secure the protection of the child after his or her return' (regulation, Art 11(4)).

[48] The injunctions or undertakings which are habitually directed or obtained prior to the child's return to the place of his habitual residence are aimed to secure the 'absconding' parent's safety from prosecution, physical intimidation or threat of violence, and are aimed at providing living standards and care of the child until the relevant court is seised of the matter at the first inter partes hearing, and thereby are designed to safeguard the integrity of the child's position. Whilst such undertakings would ensure that L was not peremptorily removed from his mother's care they could not mitigate his profound sense of loss, as I have found would occur as indicated above. I can think of no safeguards which would supply or mitigate the loss of his community, society and present lifestyle in the short or medium term and therefore, at his age, the 'grave risk' of psychological harm or intolerability will go unabated. I make clear at this juncture that I would not regard the general descriptions of domestic abuse as found by the Lithuanian appellate court to satisfy the Art 13(b) exception or otherwise to be a situation incapable of resolution by satisfactory safeguards.

[49] That the mother has substantiated an 'exception' to return is no bar to an order that she return L subject to the discretion of the court. In the exercise of my discretion I bear in mind the approach as indicated by Baroness Hale of Richmond in *Re M (Children) (Abduction: Rights of Custody)* at paras [43] and [44]:

> '… in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare.
>
> … the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously.

> The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'

[50] I, therefore, weigh in the balance issues of 'general considerations of comity, … confidence' and deterrence which Mr Gupta urges upon me, the position of the legal proceedings in Lithuania, which Mr Devereux describes as back at square one, the facts that relate particularly to L and would otherwise found the 'exception' against summary return pursuant to Art 13(b) as re-iterated by Ms Ramsahoye, and bear in mind that the major objective of the Hague Convention cannot be achieved. These are no longer 'hot pursuit' cases. By definition, for whatever reason the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Hague Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the 'child's … integration in her new community' (*Re M* (above) at para [47]).

[51] I have considered in this exercise whether I am able to fulfil the objectives of the Hague Convention in the return of a child wrongfully removed/retained from his place of habitual residence and ameliorate the harm/intolerable situation I have identified above by 'suspending' or 'staying' an order for return on conditions as did the President of the Family Division and Black J in *JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), [2007] 2 FLR 900, and *F v M and N (Abduction*: *Acquiescence: Settlement)* [2008] 2 FLR 1270 respectively. Mr Devereux urges me to do so if I find against his other arguments. Mr Gupta argues that to do so would undermine the principle and spirit of the Hague Convention by the overlay of an order for summary return by a 'perverse simultaneous order rendering it unenforceable'.

[52] I consider the possibility of 'suspension' of order to be well within the armoury of the court at the time of exercising its discretion or considering the timing and imposition of 'safeguards' necessary to protect the child upon return. However, its deployment is necessarily fact specific and will certainly be the exception rather than the rule for the reasons urged by Mr Gupta.

[53] In this case I have contemplated a stay of order under both 'safeguard' and discretion and reject it since I conclude that that which seeks to protect L will promulgate the harm it seeks to abate. Having adjudged him on the evidence to be 'settled' to the relevant degree which invokes Art 13(b), to delay any appropriate return would mean that the harm he is at grave risk of suffering is increased with his ever increasing establishment, stability and security of life in the UK and his foreseeable lack of comprehension in the short and medium term as to why he would be alienated from home, family and friends.

[54] In this I am fortified by para 107 of the Perez-Vera report to this effect:

> 'In the first paragraph [of Article 12], the article brings a unique solution to bear upon the problem of determining the period during

> which the authorities concerned must order the return of the child forthwith. The problem is an important one since, insofar as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it – something which is outside the scope of the Convention …'

[55] This is not a case such as *JPC v SLW and SMW (Abduction)* and *F v M and N (Abduction*: *Acquiescence: Settlement)* (above) where in both cases the courts of habitual residence were well advanced with the children's cases and/or able to proceed expeditiously to conclusion. The Lithuanian court has still to re-commence the children's proceedings once both mother and father fully engage with the process. The father has shown a recent reluctance to do so, as I find above, no doubt by reason of his work commitments in Sweden.
[56] Before concluding this exercise of discretion I have considered Mr Gupta's arguments that I must also weigh in the balance Arts 11(7) and (8) of the regulation, that is the right of the father to pursue his application for custody, which could result in an order for return of the child enforceable in accordance with section 4 of Chapter 3 of the regulation. He submits that this would be the worst of all possible scenarios where the court would have 'lost the ability' to organise a smooth transition and return for L. I reject his arguments as relevant to this exercise of discretion. It is clear that the order for return in such circumstances could only be the result of an examination of welfare issues – a task this court is unable to undertake within the present 'Hague' proceedings.
[57] In all these circumstances I exercise my discretion against ordering an immediate return of L to Lithuania.
[58] In the light of my refusal to order L's return and in all the particular circumstances of this case, and with the acceptance of the mother, I consider that it is appropriate to invite the Lithuanian court to stay the case as it relates to L's residence and contact and invite the English court to assume jurisdiction of the same. The mother, it seems to me, has become habitually resident here, and these courts will be better placed to conduct any further necessary welfare investigations into L's present circumstances, and those in which he has lived during the past 2 1/2 years. The case can be disposed of speedily if both parties engage. The father is not a full-time resident in Lithuania and will have equal geographical access to the courts in this jurisdiction as he would in Lithuania.

Order accordingly.

Solicitors: *Mishcon De Reya* for the plaintiff
Dawson Cornwell for the first defendant
Reynolds Porter Chamberlain for the second defendant

PHILIPPA JOHNSON
Law Reporter